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Jeffrey O'Connell

Chad M. Oldfather

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# A Lost Opportunity: A Review of the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury

JEFFREY O'CONNELL\*  
CHAD M. OLDFATHER\*\*

The American Law Institute (ALI) Reporters who under took their study on Enterprise Responsibility for Personal Injury (the *Study*) were charged with thoroughly exploring the operation of the tort system as it applies to personal injury, with an eye toward the feasibility of fundamental changes. Although the *Study* vividly documents the inadequacies of tort law, it unfortunately drew back from its mandate and, on the whole, became mired in technical detail and overly cautious, incremental changes such that the *Study's* recommendations would leave intact far too much of the tort system it so effectively indicts.

By way of contrast, consider the experience in Britain and New Zealand: on June 10, 1941, the wartime British government created the Inter-Departmental Committee on Social Insurance and Allied Services, which was "[t]o undertake, *with special reference to the inter-relation of the schemes*, a survey of the existing national schemes of social insurance and allied services, including workmen's

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\* The Samuel H. McCoy, II Professor of Law, University of Virginia, B.A., Dartmouth College, 1951; J.D., Harvard University, 1954.

\*\* B.A., Harvard University, 1989; J.D., University of Virginia, 1993.

We are grateful for his comments on this manuscript in draft form to Professor O'Connell's colleague at the University of Virginia Law School, Professor Kenneth Abraham, a key figure in the formulation of the *ALI Study*, especially for his typical breadth of mind (and occasional firm dissent) in responding so fairly and graciously to us as we were in effect taking pot shots at him.

compensation, and to make recommendations."<sup>1</sup> William Beveridge, then with the Ministry of Labour, was made the committee's chairman. Beveridge perceived, correctly, that the government did not envision the study as one of great importance.<sup>2</sup> Nevertheless, from the beginning Beveridge "intended to place a very ambitious interpretation on the Committee's terms of reference,"<sup>3</sup> in spite of their limited scope and the fact that his colleagues were thereby reluctant to do so. Beveridge skillfully controlled the Committee's agenda, and "insisted from the start of the inquiry that all of the insurance system should be fundamentally re-assessed, and that this re-assessment should be extended to include many other areas of policy — such as medical treatment, prevention of unemployment and provision for large families."<sup>4</sup> The Committee completed its work rapidly, and released the now legendary *Beveridge Report* in December 1942 to "euphoric popular reception."<sup>5</sup> Though the *Beveridge Report* differed radically from what the government expected, it became the basis for the set of social policy statutes that included the Family Allowances Act of 1945, the National Insurance and National Health Service Acts of 1946, and the National Assistance Act of 1948, all of which adopted the structure and ("cradle to grave") principles of the *Beveridge Report*.<sup>6</sup>

In a similar vein, on May 16, 1966, the government of New Zealand approved in principle the establishment of a Royal Commission to study improvements in the workers' compensation system.<sup>7</sup> The Commission came together in September of that year, with Mr. Justice A. O. Woodhouse as chairman.<sup>8</sup> The warrant creating the Commission, like its British counterpart, defined its scope narrowly: "to receive representations upon, inquire into, investigate, and report upon the law relating to compensation and claims for damages for

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1. WILLIAM BEVERIDGE, *POWER AND INFLUENCE* 296 (1953) (emphasis added).

2. JOSÉ HARRIS, *WILLIAM BEVERIDGE: A BIOGRAPHY* 382 (1977).

3. *Id.* at 386.

4. *Id.* at 387.

5. *Id.* at 421. The euphoria was not universal. In writing about the great expansion of Army education during the Second World War, Keith Geoffrey has noted:

There were certainly very mixed reactions to the weekly classes which platoon commanders were required to run. It was difficult even to stimulate interest in the great Beveridge Report on Social Security. "The only Beveridge we want," responded one group, "is beer and tea that isn't . . . gnat piss."

Keith Geoffrey, *Marching by the Left*, reviewing S.P. MacKenzie, *Politics and Military Morale*, in *THE TIMES LITERARY SUPPLEMENT*, Aug. 21, 1992, at 20.

6. *Id.* at 448-49.

7. GEOFFREY PALMER, *COMPENSATION FOR INCAPACITY: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA* 68 (1979).

8. *Id.* at 69.

incapacity or death arising out of accidents (including diseases) suffered by persons in employment. . . ."<sup>9</sup> The Commission finished its work rapidly and released its *Report* in December, 1967. Here again one man — Woodhouse — had a vision that went way beyond his mandate, and his vision shaped the Commission's work. Rather than limiting itself to consideration of injuries suffered in the course of employment, the Commission recommended the dismantling of the entire personal injury tort system substituting therefore a comprehensive no-fault compensation scheme — a recommendation shortly thereafter carried into effect. The essence of the *Report* is captured in the first two of the five guiding principles it enumerated for a modern system of compensation:

First, in the national interest, and as a matter of national obligation, the community must protect all citizens (including the self-employed) and the housewives who sustain them from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity;

Second, all injured persons should receive compensation from any community financed scheme on the same uniform method of assessment, regardless of the causes which gave rise to their injuries.<sup>10</sup>

Although 254 pages long, the *Report* contained very little empirical data concerning the operation of the personal injury system in New Zealand. Instead, Justice Woodhouse, who was the sole author of the entire *Report*,<sup>11</sup> based his arguments almost entirely on principle in order to have the greatest possible impact.<sup>12</sup> He succeeded, and New Zealand's current comprehensive compensation scheme reflects the vision he put forth in his *Report*.<sup>13</sup>

In striking contrast to these ambitious works stands the American Law Institute's *Reporters' Study on Enterprise Responsibility for Personal Injury*. Work on the *Study* began in 1986, and the Institute had at that time a broad vision of what it hoped to accomplish. Professor Richard Stewart, who was the *Study's* Chief Reporter until 1989, wrote at the outset of the *Study*:

The tort liability and insurance system displays symptoms of potential crisis. These symptoms are most acute in the context of personal injuries

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9. ROYAL COMMISSION TO INQUIRE INTO AND REPORT UPON WORKERS' COMPENSATION, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 11 (1967).

10. *Id.* at 39.

11. Palmer, *supra* note 7, at 73. "The Commissioners took the view that if the work stylistically bore the mark of several hands it would not have the impact needed." *Id.*

12. *Id.*

13. See *infra* notes 23 and 84 and accompanying text.

caused by business, professional, and government enterprise activities. Liability insurance rates have increased sharply. In some fields, affordable insurance has not been available at all from commercial insurers. Very large jury verdicts are increasingly common. The threat of enormous tort liabilities has driven major corporations to bankruptcy. Concerns over liability exposure have led to withdrawal of vaccines and other medical products from the market. Administrative costs of the tort system in areas such as products liability, medical malpractice, and toxic torts far exceed the compensation provided the injured.<sup>14</sup>

The Project on Compensation and Liability for Product and Process Injuries (later renamed the Project on Enterprise Responsibility for Personal Injury)<sup>15</sup> sought to address this crisis through the development of "an adequate comparative analysis of various institutions — of their strengths and weaknesses in pursuing particular goals with respect to different types of injuries in different settings . . . . [which] could help us to determine whether there is a crisis of tort law, and to the extent such a crisis exists, its appropriate institutional diagnosis and cure."<sup>16</sup> Thus, in stark contrast to the British and New Zealand experience, the ALI set out with a very broad purpose in mind only to end up with a disappointingly narrow focus, concentrating on relatively modest changes in tort law doctrines. In this connection, we focus in this review on the *Study's* recommendations for product liability and medical malpractice. In our view these areas were and are much more susceptible to reform in the near future.<sup>17</sup>

The *Study* is, by many measures, an impressive piece of work. Its two volumes contain a total of 1030 pages, representing a comprehensive overview of the law and scholarship in the area. It is, and doubtless will be for some time, unparalleled as a general source of information and analysis of the tort system and its institutional complements (though its value as a source is crippled by its lack of an index).<sup>18</sup> Yet, its comprehensiveness may also be the *Study's* greatest flaw. Reading the *Study* one can discern (sometimes, but by no means always, between the lines) that its authors were acutely aware

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14. Richard B. Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184, 184 (1987).

15. AMERICAN LAW INSTITUTE, REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter ALI STUDY].

16. Stewart, *supra* note 14, at 186.

17. See *infra* note 104 and accompanying text.

18. Indices are a prime example of G. K. Chesterton's chestnut that anything worth doing is worth doing badly, in that any index — even a bad one — is infinitely more helpful than no index. Large sums were spent on this *Study*. How much more would hiring an indexer have cost the ALI, especially since the whole *Study* was on a word processor, making indexing infinitely easier? Indeed even the *Study's* Table of Contents is very inadequate in only listing the relatively few chapter titles, ignoring the many headings and subheadings therein. (In chapter 6, for example, there are 13 of them). Providing headings and subheadings in the Table of Contents was especially necessary because of the lack of an index.

of the shortcomings of the tort system. They saw its scandalous fortuity, delays, and transaction costs,<sup>19</sup> as well as the shaky underpinnings of tort law's payment for victims' noneconomic losses.<sup>20</sup> One can arguably deduce from the *Study's* exploration of the feasibility of expanding first-party disability coverage attempts to find alternatives to the tort system. In this connection, the *Study* finds little hope in this or other avenues of expanding private or social insurance (or a combination thereof) as a means of lessening America's reliance on the tort system.<sup>21</sup> The senior author of this article has written extensively — especially with reference to products liability and medical malpractice — on reforms that assume the necessity of the tort system at least as a backdrop or backup to changes in personal injury compensation for the same reasons cited in the *Study*.<sup>22</sup> But this leads us to the essential flaw in the *Study*. Having failed to find their way out of what they conceded was a maze, the authors proceeded to indiscriminately explore so many nooks and crannies of the extant tort system that they became lost in it. The virtue a report must strive for, above all, is a sense of vision — which, argue with their results as one might,<sup>23</sup> Beveridge and Woodhouse had — and which this *Study* so signally lacks. And when one is dealing with a subject as tragically bad as the tort system — by the *Study's* own account — to end up pinioned on both caution and detail is deeply disappointing.

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19. See *infra* note 32 and accompanying text.

20. See *infra* notes 63-64 and accompanying text.

21. 1 ALI STUDY, *supra* note 15, at 157-80. See also JEFFREY O'CONNELL, ENDING INSULT TO INJURY 73-80 (1975).

22. See *infra* notes 72-74 and accompanying text. In this connection the senior author differs (as do the ALI Reporters) from Professor Stephen Sugarman:

[A] separate accident system for meeting losses beyond those met by social insurance is apparently going to be with us indefinitely. Perhaps one can envisage its ultimately being replaced [as Professor Sugarman later came to urge] by a vast scheme of social insurance [which, though, for purposes of deterrence would have to be] supplemented by large-scale charge-backs against enterprises based on their risks, but at the very best that is a long way off, and in the indefinite meantime the need for a more sensible scheme of tort liability remains.

O'CONNELL, *supra* note 21, at 80; see also JEFFREY O'CONNELL, THE LAWSUIT LOTTERY 182-85 (1979); JEFFREY O'CONNELL, Foreword to STEPHEN SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW at ix, xi (1989).

23. E.g., *infra* note 84 and accompanying text.

## I. OVERVIEW OF THE STUDY'S CONTENTS

The first volume of the *Study*, entitled "The Institutional Framework," essentially serves to define the context in which the ALI undertook the *Study*. Thus, it outlines the events that gave rise to the *Study* and thoroughly summarizes the contemporary scholarship addressing those events and their perceived causes. The primary genesis of the *Study* was the crisis in the litigation and insurance systems that occurred in the mid-1980s. At that time many providers of goods and services had to cope with large rises in their insurance premiums or, in some cases, the complete unavailability of insurance at any cost. Popular opinion linked this phenomenon with the perceived breakdown of the tort liability system.

Accordingly, the second chapter focuses on the interaction between tort law and liability insurance. After a thorough discussion of the various hypotheses advanced by the commentators to explain the crisis in the liability insurance system, the *Study* rightly rejects any internal machinations and conspiracies within the insurance industry as the cause of the difficulties, and instead concludes that "a significant share of the responsibility for what occurred in the liability insurance markets during the decade of the 1980s was caused by developments within the civil liability system."<sup>24</sup> The factor that the authors believe may well have been largely responsible for the situation in the mid-1980s is uncertainty: "premiums may have risen and coverage may have become unavailable at least in part because neither policyholders nor insurers could predict liability exposure as reliably as they had done in the past."<sup>25</sup> The authors then conclude that:

[o]ver the long term changes in the tort system that expand or contract liability and legal uncertainty — allocating more or less responsibility for compensation and deterrence to the tort system, as opposed to other systems of achieving these goals — are likely to have the greatest impact on the ability of the insurance markets to provide the insurance protection that American enterprises require.<sup>26</sup>

From this conclusion they draw their view of the *Study's* goals: "[I]n the remainder of this Report we examine the role played by

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24. 1 ALI STUDY, *supra* note 15, at 102. The *Study* recognizes that the aggregate cost of insurance in the long run is necessarily tied to the aggregate amount of liability generated by the tort system, while also recognizing a number of other factors that can blur this relationship in the short run. *Id.* at 80-83.

25. *Id.* at 86. Elements of this uncertainty are said to include expansion of the underlying base of liability as well as changes in tort doctrine that increase the difficulty of insuring certain activities, a dramatic rise in the number of large jury verdicts, and expansive judicial interpretation of the language of liability insurance policies. *Id.* at 88-94.

26. *Id.* at 103.

these other systems [of compensation other than tort] and make recommendations for re-allocating responsibility among them and the tort system."<sup>27</sup> The balance of the first volume contains a broad survey of the institutions that overlap with the personal injury tort system<sup>28</sup> and the dynamics of settings in which personal injuries occur.<sup>29</sup> The final chapter is a comparative evaluation of "Tort and Its Alternatives." The tort system does not fare well in this analysis: "[O]ur review of the empirical evidence leads us to a relatively skeptical view of tort litigation as an injury prevention mechanism, and an even bleaker evaluation of the tort system as a compensatory mechanism."<sup>30</sup>

Having thus indicted the tort system, the *Study*, in the second volume entitled "Approaches to Legal and Institutional Change," offers suggestions as to how the system might be altered in order to reduce the impact of the problems highlighted in the first volume. The first chapter summarizes the findings of the first volume<sup>31</sup> and makes clear that the authors fully appreciate the size of the problems presented by tort law.<sup>32</sup> Although, characteristically, the authors quickly qualify their conclusions, the strong language leaves the reader expecting significant, if not radical, proposals.

The remainder of the volume is devoted to setting out the *Study's* proposals. While the *Study* recommends retaining strict product liability for manufacturing defects, it suggests that courts should acknowledge that the standard they employ in design-defect and

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27. *Id.*

28. These institutions include No-Fault Workers' Compensation (ch. 3), Health Insurance (ch. 4), Private Disability and Life Insurance (ch. 5), Social Insurance Alternatives (ch.6), Markets (ch. 7), and Regulation (ch. 8). See 1 ALI STUDY, *supra* note 15.

29. These include Product Injuries (ch. 9), Medical Injuries (ch. 10), Environmental Injuries (ch. 11), and Workplace Injuries (ch. 12).

30. *Id.* at 448.

31. See 2 ALI STUDY, *supra* note 15, at 3-7.

32. "[L]urking beneath the surface of the liability insurance crisis of the mid-eighties were serious difficulties in the operation of the tort system." *Id.* at 3. "[D]eserving victims with legitimate claims continue to face high barriers to obtaining tort redress." *Id.* at 5. "[U]sing a liability regime to redress and distribute the risks of enterprise-related injury creates in effect a type of loss insurance that is badly skewed in design and terribly expensive to administer." *Id.* at 5.



product-warning cases is merely a form of negligence.<sup>33</sup> It also recommends giving greater weight to a defendant's compliance with applicable regulation,<sup>34</sup> and changing (or "channeling") the orientation of medical malpractice litigation to make hospitals (or similar health-care organizations) primarily responsible for liability.<sup>35</sup>

With respect to tort damages, the *Study* advocates reversal of the collateral source rule,<sup>36</sup> and similarly proposes that all workers' compensation awards be offset against product liability judgments.<sup>37</sup> Although it does not go so far as to argue that no damages should be paid for pain and suffering, it does support limiting their applicability to cases in which the plaintiff has suffered significant injury, and in those cases would have courts provide juries with more meaningful guidance as to the size of the award.<sup>38</sup> Similarly, the *Study* makes a series of proposals concerning liability for punitive damages,<sup>39</sup> which the authors also do not wish to eliminate completely, the most basic of proposals being to limit an enterprise's liability for punitive damages to those cases in which it can be shown by clear and convincing evidence that the enterprise recklessly disregarded the safety of others.<sup>40</sup> The *Study* also recommends including reasonable attorney fees incurred by a successful plaintiff as damages.<sup>41</sup> Incidentally, the *Study* curiously confines to only a footnote periodic payment of tort awards (although what it says is balanced and sensible).<sup>42</sup>

From there the *Study* addresses the even much more intractable problems of toxic and mass torts. These include the problem that science does not always have the answers to the questions of causation that are being asked in the courts.<sup>43</sup> The *Study* recommends creation of a federal agency to serve as a source of "impartial" scientific experts and leadership in developing better ways to litigate

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33. *Id.* ch. 2. Thus the *Study* proposes that "[a] product's design should be deemed defective if and only if there was a feasible alternative design which, consistent with the consumer's expected use of the product, would have avoided the particular injury, and if the costs of the alternative design are less than the costs of the injury thereby avoidable." *Id.* at 56. The *Study* makes a number of suggestions with respect to product-warning cases, the most significant of which would entail the formation of a federal agency to standardize risk-level warnings for products. *See id.* at 57-80.

34. *Id.* ch. 3.

35. *Id.* ch. 4. For a discussion of experimentation with contractual no-fault schemes for product and medical care injuries, see *infra* notes 69-72 and accompanying text.

36. *Id.* ch. 6.

37. *Id.* ch. 7.

38. *Id.* ch. 8. *See also infra* note 64 and accompanying text.

39. *Id.* ch. 9.

40. *Id.* at 247-49, 264.

41. *Id.* ch. 10.

42. *Id.* at 9 n.1.

43. *Id.* ch. 11.

cases that turn on questions of science.<sup>44</sup> It also considers the problems unique to environmental litigation<sup>45</sup> and mass torts.<sup>46</sup> Finally, the *Study* considers some alternatives to tort liability.<sup>47</sup>

## II. ANALYSIS

The *Study's* suggestions, taken individually, arguably make sense. For example, consider the *Study's* recommendation concerning the collateral source rule.<sup>48</sup> The traditional formulation of the rule holds that evidence of other sources of compensation (such as first-party health insurance) is inadmissible against a plaintiff in a tort suit.<sup>49</sup> The practical result of this is that a plaintiff can recover twice for the same injury — once from his first-party insurer and once from the defendant.

The *Study* thoroughly considers the reasoning behind the rule, recent statutes modifying the rule and their implications, and the impact that doing away with the rule might have on deterrence and compensation.<sup>50</sup> The rationale for the collateral source rule has three prongs.<sup>51</sup> First, its proponents argue that without the rule there would be a decrease in the deterrent effect of the tort system, as defendants would be subject to reduced liability.<sup>52</sup> Second, the tort system might undercompensate plaintiffs without the rule — either because they have to pay their attorneys from somewhere or because the system may not recognize all of their injuries as legitimate bases for compensation.<sup>53</sup> Finally, recoveries are often subject to insurers' rights of subrogation.<sup>54</sup>

In response to these arguments, the *Study* cites evidence concluding that the deterrent effect of the collateral source rule is unclear and that subrogation agreements are not allowed in some jurisdictions, and even where such agreements are allowed they are often not used for a variety of reasons.<sup>55</sup>

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44. *Id.*

45. *Id.* ch. 12.

46. *Id.* ch. 13. See *supra* note 17, *infra* note 104, and accompanying text.

47. *Id.* chs. 14-18.

48. *Id.* at 162.

49. *Id.*

50. *Id.* at 162-75.

51. *Id.* at 162-63.

52. *Id.* at 163.

53. *Id.* at 163-64.

54. *Id.* at 164-65, 167-72.

55. *Id.*

The *Study* concludes that:

at present the effect of the rule (where it still operates) is to promote additional compensation of successful plaintiffs, because subrogation by collateral sources is uncommon. By the same token, however, the absence of subrogation probably marginally decreases the amount of first-party health and disability insurance that is generally available by raising its cost.

Consequently, the question is which category of victims to target. If one focuses on successful plaintiffs, the traditional collateral source rule, absent effective subrogation, promotes compensation but may produce duplicate compensation in some cases. But if one focuses on victims generally, a collateral source rule promotes compensation only if it is accompanied by effective subrogation, because subrogation can marginally reduce first-party insurance premiums.<sup>56</sup>

Because the authors believe that "effective subrogation" would be difficult to facilitate, they propose abolition of the collateral source rule accompanied by the prohibition of subrogation clauses.<sup>57</sup> This proposal is sensible because, as the authors state, the tort system is expensive to administer and thus makes for a very inefficient insurance mechanism.<sup>58</sup> Further, as they recognize, "the rule provides the victim with what amounts to duplicate insurance — coverage against losses that the victim has already insured through collateral sources."<sup>59</sup>

The *Study's* recommendation with respect to damages for pain and suffering provides a similar example. Although at present almost half of all tort damages consist of payment for pain and suffering,<sup>60</sup> it is not the aggregate amount of these damages that causes the greatest problem. Rather, the erratic manner in which these damages are awarded is the problem. As one commentator noted almost thirty years ago, "[P]ain and suffering have no dimensions, mathematical or financial. Whatever claim or award is based upon these intangibles must, therefore, be conceived at the end of a speculative and uncertain journey."<sup>61</sup> Because of this lack of standards, it is virtually impossible to determine what a jury will do with a particular case.<sup>62</sup> The result is inequity between awards, and uncertainty that makes it difficult for insurers to predict the amount of damages to which they might be exposed for any given activity. This in turn leads to higher prices or, in extreme cases, unavailability of insurance at any price.

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56. *Id.* 175-76.

57. *Id.* at 179.

58. *See id.* at 168-69.

59. *Id.* at 169.

60. This is valid at least as to medical malpractice and products liability cases. *See id.* at 201.

61. William Zelermyer, *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 27-28 (1954).

62. *See* Marcus L. Plant, *Damages for Pain and Suffering*, 19 OHIO ST. L.J. 200, 208-10 (1958).

In addition to these administrative difficulties, the *Study* points out that, given prevailing views as to the functions of the tort system, there is an additional difficulty inherent in the awarding of damages for pain and suffering: “[w]hen tort doctrine is pictured . . . as a port of entry into an insurance program paid for and provided by members of the community for themselves[,] the claim of pain and suffering to *any*, let alone *full*, compensation appears shaky.”<sup>63</sup> Even so, the *Study* limits itself to proposing that damages for pain and suffering “be paid only to victims who suffer significant injuries, with substantial monetary awards paid to the permanently disabled who can use the additional funds to adjust to and better enjoy life in their future disabled state.”<sup>64</sup>

Both of these proposals as to collateral sources and pain and suffering damages would arguably improve the functioning of the tort system, for reasons the *Study* advances. Nevertheless, these proposals, as with the other proposals enumerated in the *Study*, would lead only to relatively minor changes within the tort system. To return to the theme of this critique, that the *Study's* principal suggestions would lead to changes *within* the tort system is somewhat ironic. The scope of the *Study's* inquiry surely extended beyond the realm of tort law. The first volume surveys a broad array of institutions that overlap with tort, ranging from workers' compensation to private and social insurance to government regulation. In the first chapter of the second volume, the authors note that their “canvass of the broader institutional constellation of which tort law is one component eventually brought us to [the conclusion that] *it is essential to avoid a 'tortcentric' approach to personal injury policy.*”<sup>65</sup> Yet, having adopted this premise, they proceed immediately to back away from it: “our policy prescriptions in this volume are largely devoted to tort law alone. As a group of tort scholars, that is where our comparative advantage lies.”<sup>66</sup> Much of the rest of the *Study* consists of similar dialogues — first strong criticism of the way the system currently works, followed by a moderation of that position and the suggestion that relatively minor adjustments are the most that can be done. If the *Study* can be said to have a theme, this is it, and the authors capture it (in almost comical vacillation) in the *Study's* last chapter: “In a sense, the Reporters are both for and against the tort regime

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63. 2 ALI STUDY, *supra* note 15, at 206.

64. *Id.* at 230.

65. *Id.* at 6 (emphasis added).

66. *Id.* at 7.

(though, we believe, not 'unduly' so)."<sup>67</sup>

Although a significant portion of the *Study* is devoted to analysis of institutions other than the tort system, the authors conclude that "the evident imperfections of tort litigation that are revealed when the system is viewed against an absolute ideal became somewhat less striking when tort was compared to the actual performance of the alternative regimes."<sup>68</sup> One senses, however, that the authors as tort scholars felt themselves more comfortable maneuvering within the interstices of tort law rather than grappling with more sweeping approaches.

For example, in contrast to an aberrational but enthusiastic and indeed very welcome recommendation for experimentation with contractual no-fault insurance for injuries in the course of health care, the recommendation for similar experimentation with product injuries is far more cautious. The *Study* states:

Substantial scholarly interest has recently focused on contractual alternatives to tort liability [for injuries caused by manufactured products] . . . . [W]e . . . encourage serious consideration of the possibilities considered in this chapter for carefully specified modifications — pre-injury or post-injury — to the background tort regime. At the same time our argument here has been relatively abstract, and we are conscious that a variety of practical questions and concerns will likely be raised about modes of implementation. Indeed, we present these contract possibilities in this chapter precisely in order to elicit such reactions from the legal community.<sup>69</sup>

Not exactly a clarion call for reform!

As to this difference in the confidence of the recommendations for experimentation with no-fault, according to the *Study*:

[W]e underline a crucial difference between the consumer product situation and . . . health care settings . . . . In the latter [context] . . . the hospital that is made liable has ample control over the circumstances giving rise to the injury and is able to investigate quickly both the causes and effects of any injuries that occur. Typically, patients are passive recipients of iatrogenic injuries . . . . By contrast, once a possibly dangerous product such as a lawn mower has left the hands of the manufacturer, the consumer is in control of the situation and is unconstrained (by the manufacturer, at least) in the risky use he or she may make of the product. Moreover, the manufacturer has no ability to investigate what kinds or causes of injuries may have occurred until compensation claims are filed much later. These evident differences in social context may imply major differences in the use and results of contract no-fault for consumer products (at least outside such specialized situations as prescription drugs, where patient behavior has much less influence on the occurrence of drug reaction injuries).<sup>70</sup>

But in contrast to such objections, products often cause injury in simple, traumatic ways (through their size, mass, speed, heat, sharp edges, and combinations thereof) that raise far fewer problems of

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67. *Id.* at 579.

68. *Id.* at 6.

69. *Id.* at 536.

70. *Id.* at 528-29.

tracing causation than do injuries incurred in the course of health care. In addition, long-accepted and well-defined implied and express warranties accompany the sale of products to a much vaster extent than with the delivery of health care — warranties that could, where appropriate, include no-fault remedies as a substitute for tort, especially if authorized by statute.

Another reason for the difference between product and medical injuries is stated as follows:

When a profit-maximizing manufacturer has to decide whether the contract no-fault option offers the firm sufficient advantages to be worth offering its customers, it will have to make this initial calculation. Do the lower per-claim costs of compensation and administration outweigh the increased number of injuries and paid claims? In fact, considerable evidence indicates that only a tiny fraction of consumer product injuries now lead to paid tort claims . . . . This suggests that the typical producer seldom would find it cost-effective (and thus sustainable in a competitive product market) to shoulder the much broader frequency of liability in return for even significant relief from the severity of liability.<sup>71</sup>

In fact a similar gap exists in adverse results from health care and tort suits, but that gap did not prevent the authors from vigorously calling for no-fault experimentation — a call that has been even more explicitly and enthusiastically made by the principal reporter of the *Study* since its publication.<sup>72</sup>

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71. 2 ALI STUDY, *supra* note 15, at 530-31.

72. Paul Weiler et al., *An Experiment for Medical Liability Reform*, 267 JAMA 2355 (May 6, 1992); Paul Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. (forthcoming 1993). On the difficulties of defining the insured event under such a proposal, see 2 ALI STUDY, *supra* note 15, at 498-501; JEFFREY O'CONNELL & C. BRIAN KELLY, *THE BLAME GAME*, 125-29 (1986); but the ALI authors indicate that such difficulties for no-fault medical malpractice may not be all that daunting, citing not only the Harvard medical malpractice study, *Patients, Doctors and Lawyers: Medical Injury, Medical Malpractice and Patient Compensation in New York*, 6:17-20 (1990), but also the experience under Sweden's and New Zealand's no-fault compensation schemes for medical injuries. "In both countries it has been possible to draw the cause or dividing line [between an adverse result caused by health care and otherwise] without any pronounced administrative burden for the overall program." 2 ALI STUDY, *supra* note 15, at 501-02. On the other hand, the basic test in Sweden seems to be whether the adverse result could have been avoided by different — in effect, better? — medical treatment, in which event compensation is paid. All of this seems to lead to a brooding element of something closely akin to fault in the concept of such "avoidable" injury. Carl Oldertz, *The Patient, Pharmaceutical and Security Insurances, in COMPENSATION FOR PERSONAL INJURIES IN SWEDEN AND OTHER COUNTRIES* 51, 64-65 (Carl Oldertz & Eva Tiddefelt eds., 1988). In New Zealand some have been so unhappy with the experience of drawing such lines that New Zealand has reverted back to even more explicitly "negligence-like" criteria than in Sweden. Accident Rehabilitation and Compensation Insurance Act, Section 5 (1992). In this connection, see W. Richard Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme* 14 HIROSHIMA L. REV. (forthcoming 1993). Even so, one hopes the *Study* and Weiler are right on the feasibility of no-fault

It is significant that the ALI's recommendations for traumatic, individual injuries from products and health care are so largely pro-defense. In this connection, why did the authors fail to propose the abolition of contributory (including comparative) fault? This would be a relatively modest change, but still more adventuresome than those the *Study* recommends — and it would be a change that would clearly advantage personal injury claimants. Such a change was adopted several generations ago for workplace accidents (before the enactment of workers' compensation); it was then urged by Fleming James in the last generation for all personal injury, and in this generation by the senior author of the article, and then by Stephen Sugarman.<sup>73</sup> Note further that the *Study* advantages the defense by eliminating the collateral source rule and full scale liability for pain and suffering, with the only *quid pro quo* for plaintiffs being payment of their attorney fees. This is in contrast to an "early offers" approach suggested by the senior author which the *Study* considers — and then rejects. Under this approach, any defendant facing a personal injury tort liability claim would have the option of offering a claimant within, say, a maximum of 180 days, periodic payment of the claimant's net economic loss. That would be prompt payment compared with compensation under the tort system. Payment would cover any further medical expenses, including rehabilitation, and wage loss, not already covered by any other health or disability insurance payable to the claimant. The proposal would also call for payment by the defendant of a reasonable fee for the claimant's lawyer.

These benefits are generous compared to those under most health insurance policies in this country; few policies, for example, cover costs of rehabilitation. Under the proposed law, if a defendant promptly offers to pay these benefits to the injured claimant, further pursuit of a personal injury claim in tort would be foreclosed. In other words, most claimants would be forced to accept such an offer.<sup>74</sup> The offer could be refused only under certain restricted circumstances: if the victim could prove beyond a reasonable doubt either intentional or wanton misconduct.<sup>75</sup>

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medical maloccurrence insurance.

73. FOWLER HARPER ET AL., *THE LAW OF TORTS* § 22.2, at 280-81 (2d ed. 1986); Jeffrey O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, With Compensatory Savings by Also Abolishing the Collateral Source Rule*, 1979 U. ILL. L. REV. 591; STEPHEN SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 186 (1989). For a brief acknowledgment of the underlying rationale of such proposals, see 2 ALI STUDY, *supra* note 15, at 511-12.

74. See Jeffrey O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. U. L. REV. 589 (1982).

75. Jeffrey O'Connell, *Two Tier Tort Law: Neo No-Fault & Quasi Criminal Liability*, 27 WAKE FOREST L. REV. 871 (1992).

Under this proposal, no defendant would be forced to offer a settlement. However, the huge costs of defending tort cases and the risk of exposure to payment for noneconomic losses in personal injury cases would encourage defendants to avoid costs and exposure by offering to pay these claimant's noneconomic losses, not only in cases they are sure to lose, but even in many — perhaps most — cases of the type presently being brought in which their liability is in doubt. One health care lawyer has said that if a similar neo-no-fault plan were in effect in the realm of medical malpractice, he would advise making an offer to pay claimants' net economic losses in 200 of the 250 cases his large office was then defending.<sup>76</sup>

In reacting adversely to this early offers proposal, the *Study* says:

By discouraging litigation over compensation for medical injuries [this] . . . neo no-fault . . . [scheme holds] out the promise of reducing the enormous delays and administrative costs associated with tort compensation for medical injuries. However, fault concepts remain central to [the scheme] . . . and [it does not increase] . . . eligibility for compensation much beyond the approximately one-quarter of total medical injuries estimated to be caused by provider negligence.<sup>77</sup>

It might be first noted that the early offers scheme is not limited to injuries caused by health care providers but extends to those from manufactured products, governmental services, and other areas.<sup>78</sup> However, as mentioned above, avoidance of the risks and expense of full-scale tort liability would probably induce defendants in many cases today to make early offers — surely a great expansion of eligibility for compensation.<sup>79</sup> But even more puzzling is the rejection of the early offers idea by the ALI on the basis that it does not sufficiently expand eligibility for compensation; at least under the early offers proposal, a defendant would have to earn the right to eliminate payment duplicating collateral sources and for pain and suffering by a prompt offer to pay net economic loss. Under the principal ALI proposals, on the other hand, defendants are granted these advantages without such *quid pro quos* for injured claimants.

The *Study* also overlooks that its recommendation for eliminating payment for noneconomic losses in smaller cases and limiting payment in larger cases across the board means that payment for *economic* losses will be corollarily reduced. When an insurer faces a

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76. Personal communication to author.

77. 1 ALI STUDY, *supra* note 15, at 393.

78. O'Connell, *supra* notes 74 and 75.

79. See *supra* note 75 and accompanying text.



possible verdict that includes common law damages for pain and suffering, it is much more likely to settle for an amount closer to a claimant's economic losses than when pain and suffering damages are eliminated or limited. As a result, the complaints of the *Study* that other proposals fail to expand payment for victims ring rather hollow.

Along this line, the *Study* could profitably have considered options such as authorizing Social Security<sup>80</sup> to utilize the early offers approach. Any alleged tortfeasor injuring a beneficiary could reimburse Social Security within 180 days for its outlays, past and future, plus payment of any economic loss not covered by Social Security or other collateral sources, in return for immunity from any further payment in tort.<sup>81</sup> If the Social Security Administration is deemed too inflexible to handle this program, the proposal may be "privatized" by allowing entrepreneurs to bid for the right to make such demands on behalf of Social Security in return for a contingent fee. Perhaps workers' compensation payors could be given similar rights.

A reader might protest that these proposals still leave too much of the tort system intact and are not all that different in scope from the marginal suggestions of the *Study*. The projection for the percentage of claims that defendants would meet by early offers<sup>82</sup> suggests the contrary. But our purpose in raising the early offers idea, and variations thereon, is not to trumpet it as necessarily adequate, but rather only to suggest that a searching analysis of alternatives to present tort law might well have more favorably considered such experimentation or others. We are disappointed that the superbly qualified authors of the *Study* failed, in the course of five years work, not only to come up with more adventuresome ideas as alternatives to tort law, but to enthusiastically endorse them.<sup>83</sup>

Note that the proposals for abolition of plaintiff's fault as a barrier to payment and for early offers are careful to preserve tort law's virtue of attempting substantial internalization of costs for those causing personal injuries. Failure to do so has caused complaints about — and even amendments to — Woodhouse's New Zealand scheme.<sup>84</sup> In this connection, those suffering personal injury by definition internalize accidents regardless of how they are recompensed

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80. Currently, medical costs are paid through Medicare and Medicaid, and wage loss through disability coverage and "old age" pensions.

81. Jeffrey O'Connell et al., *Reforming New Zealand's Reform: Accident Compensation Revisited*, N.Z.L.J. 399 (Nov. 1988).

82. See *supra* note 76 and accompanying text.

83. Jeffrey O'Connell, *Foreword* to STEPHEN SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* ix (1989); see also *infra* notes 107-09 and accompanying text.

84. Richard S. Miller, *The Future of New Zealand's Accident Compensation Scheme*, 11 U. HAW. L. REV. 1 (1989); *An Analysis and Critique of the 1982 Changes to New Zealand's Accident Compensation Scheme*, 14 HIROSHIMA L. REV. (forthcoming)

from insurance.<sup>85</sup>

The *Study's* treatment of automobile insurance only too well illustrates its failure to rise to the occasion regarding the need for fundamental tort reform. Early on, the *Study* briefly wades into disputes about the proper structure of tort liability as it applies to automobile insurance:

In the motor vehicle field . . . litigation rates, though substantial, have been stable for the last two decades. Perhaps because of jurors' recognition that they themselves might easily be the defendants in such suits, damage awards were also relatively moderate in amount, and at least in real terms have not manifested any pronounced upward trend.

In recent years popular reaction against premium increases in auto insurance has generated heated political debate in a number of states (including California and New Jersey). No major changes in tort doctrine have appeared to contribute significantly to that phenomenon; in any event, the general recommendations we make for reform of the tort system (regarding damages for pain and suffering, for example) would, when applied to motor vehicle litigation, ameliorate many of the same deficiencies that manifest themselves in that context.<sup>86</sup>

The thrust of all this is to rather cursorily dismiss the need for fundamental change in auto accident compensation, including no-fault insurance, and to suggest instead that the relatively marginal changes recommended in the *Study* would largely solve existing problems.

But the rise in auto insurance claims and costs has in fact been due to tort law itself, and is not so insignificant as the *Study* implies — nor due largely to property damage claims.<sup>87</sup> Consider the following from a recent study by a leading automobile insurer, Liberty Mutual Insurance Company:

To . . . dramatize the effectiveness of [the relatively radical reform of] no-fault [auto insurance], one can review the results in two states — California and New York. These two states are similar in many respects. They have large urban populations which have easy access to sophisticated (and expensive) medical and legal services. In terms of property damage frequency, New York is slightly higher than California owing, perhaps, to the fact that New York is somewhat more densely populated. The major difference between these two states is that New York has a verbal threshold no-fault law while California has the traditional tort-liability system. The graph below compares the bodily injury [BI] liability claims to property

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1993); but see Walter Gellhorn, *Medical Malpractice Litigation* (US); *Medical Mishap Compensation* (NZ), 73 CORNELL L. REV. 170 (1988).

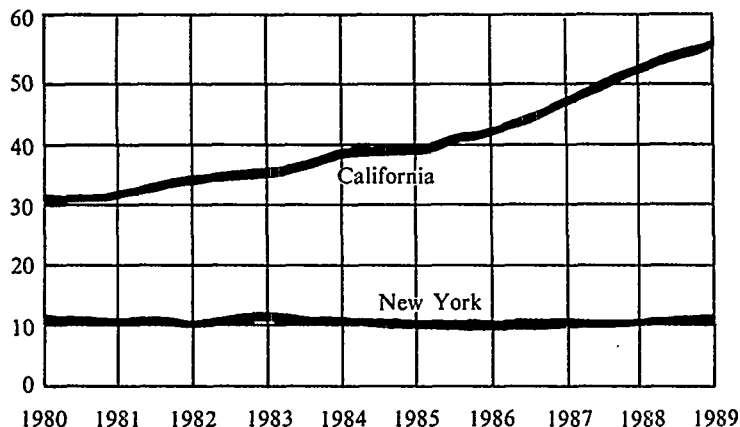
85. O'Connell, *supra* note 73, at 593-94.

86. *Id.*

87. A footnote reads: "That popular reaction [against increases in auto insurance premiums] is precipitated by receiving the overall bill for one's auto policy, a significant portion of which stems from collision and theft coverage." 1 ALI STUDY, *supra* note 15, at 8-9.

damage [PD] ratios for New York and California. In 1989, there were 56 bodily injury claims in California versus 11 for New York for every 100 property damage claims.

BI Claims per 100 PD Claims



In California (where lawsuits are allowed for all injuries) the bodily injury claim pattern is climbing and no end is in sight. The lower claim patterns in New York (where lawsuits are allowed only for "serious" injuries) are clearly evident and are reflected in the liability rates charged by Liberty Mutual and the rest of the industry. In spite of the fact that the true accident frequency is higher in New York and that New York includes a minimum of \$50,000 in no-fault benefits, Liberty Mutual's average liability rate for the first half of 1989 was \$405 in New York compared to \$550 in California, a difference of \$145 per car. Similar differentials are found in the rates of other carriers.<sup>88</sup>

Regardless of whether, as the *Study* asserts, *changes* in tort doctrine are the cause of the ills of auto insurance,<sup>89</sup> tort doctrine, with its emphasis on disputes over negligence and payment for pain and suffering, is very much at the heart of auto insurance's liability problems. According to a 1989 insurance industry study conducted by the All-[Insurance] Industry Research Council (AIRAC):

Tort thresholds in the no-fault states, designed to reduce costs and legal complexities for the less serious injuries, appear to have eliminated about 21 % of the potential liability claims among persons collecting no-fault . . . benefits in 1987. This is only half as many as were eliminated in 1977. . . . This decrease is one measure of how much the effect of the tort threshold has been eroded by inflation and by [broadening] legal interpretations [undermining thresholds] over the intervening 10 years. The connection between attorney involvement and the higher claims costs results in a vicious cycle.<sup>90</sup>

88. JOHN CONNORS, NO-FAULT 10-11 (Liberty Mutual Insurance Co., 1991).

89. See *supra* notes 25-26 and accompanying text.

90. ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES 13 (1989) (AIRAC is now known as the Insurance

What is referred to in this last sentence is that the erosion of tort thresholds has been accompanied by more and more attorney involvement in auto accident claims. Overall, attorney involvement in all types of auto personal claims has increased forty-two percent since 1977.<sup>91</sup> Keep in mind, as the AIRAC study indicates, that pain and suffering "typically is treated as a multiple of the tangible economic losses such as medical bills and lost wage."<sup>92</sup> Claimants with attorneys report much higher than average amounts of economic loss, regardless of the severity of the injuries, mainly because they obtain much more medical treatment. The greater use of medical treatment persists even when claims are sorted by type of injury, days of restricted activity, need for hospitalization, and other measures of injury severity.<sup>93</sup>

True, eliminating payment for pain and suffering in smaller cases, as the *Study* advocates, would deal with many of these problems. Perhaps we may come to that — but once again where is the *quid pro quo* for accident victims? In no-fault auto insurance, as with workers' compensation, the *quid pro quo* for eliminating payment for pain and suffering has been seen as no-fault payment for economic losses.

If the tort system were still applicable to workplace accidents to the extent that it now applies to auto accidents, the *Study* (especially Professor Weiler, a leading expert on workers' compensation) would not likely have implied that the problems in workplace accident insurance are not all that much related to the tort system, or that the suggestions made in the *Study* would be adequate to deal with workplace accidents. On the contrary, the extent to which the *Study* understands how much better a no-fault system would operate than the tort system is contained in one of its infrequent departures from a "tortcentric" focus — its recommendation to:

[R]emove all employee rights to sue product manufacturers in tort for workplace injuries [in third party accidents] in return for significant improvement in [no-fault workers' compensation] benefits available to all workers (in particular the indexing of long term [workers' compensation] disability or survivorship benefits), while preserving the employer's right to sue the product manufacturer to recover [workers' compensation] benefits paid for injuries resulting from the wrongful conduct of the third-party manufacturer.<sup>94</sup>

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Research Council).

91. *Id.* at 9.

92. *Id.*

93. *Id.*

94. *Id.* at 198.

Consideration of the problems of auto insurance, as opposed to the *Study's* actual focus on products liability, medical malpractice, and toxic and mass tort injuries, was certainly not essential to its thesis. However, there was no reason to dismiss the problems of tort law as applied to payment for personal injury auto claims as relatively unimportant. Likewise, the implication that to the extent that such is not the case, the changes proposed for other areas would so satisfactorily deal with the problems of tort law for personal injury payment after auto accidents is ungrounded.<sup>95</sup>

The *Study's* treatment of auto insurance is discussed here at some length because it reveals so graphically the *Study's* reluctance to deal with the fundamental flaws of the tort system. To put it bluntly, any massive study of personal injury tort law that goes out of its way to manifest complacency about the impact of such law on auto accident compensation forfeits a claim to suitable boldness.

All this goes to a much more fundamental point: contrary to the *Study's* implication, it is not so much "changes in tort doctrine" that contribute to the essential problems of tort liability in any field, including medical malpractice and products liability. Take strict liability for products: the problems plaguing medical malpractice insurance, governed by negligence principles and *not* strict liability, have closely tracked those of product liability. This indicates how little the biggest change in doctrine (from negligence to strict products liability) has in fact meant for tort law. The flaws of tort law, in other words, rage not so much because of recent permutations in tort doctrine, but for far more fundamental reasons. Its flaws rage not only in liberal states like New Jersey, but in conservative states like Virginia (which has not even adopted strict products liability,<sup>96</sup> nor comparative negligence). Basically,<sup>97</sup> the flaws rage because people who are genuinely injured (or who can be made to appear so by skillful counsel) can threaten to get before triers of fact, whether jurors or judges, with plausible, if sometimes tenuous, theories that the defendant's product or conduct was flawed under tort law's hoary but still inherently manipulable criteria of liability and damages.

In the end the *Study* leaves most of these problems intact. Even if its recommendations were adopted, tort law would remain painfully slow, appallingly expensive to administer, and agonizingly uncertain in terms of results for both plaintiffs and defendants — sins the

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95. For a proposal to deal with problems currently plaguing auto insurance, see Jeffrey O'Connell, *No-Fault Auto Insurance: Back By Popular (Market) Demand?*, 26 SAN DIEGO L. REV. 993 (1989). See also Jeffrey O'Connell, Stephen Carroll, Michael Horowitz, and Alan Abrahamse, *Consumer Choice in the Auto Insurance Market*, 52 MD. L. REV. (forthcoming 1993).

96. Peter Swisher, *Products Liability Reform*, 27 U. RICHMOND L. REV. (forthcoming 1993).

97. See *supra* notes 30 and 32 and accompanying text.

*Study* itself documents again and again. Three, four, five, six, seven years — or more — is a long time to wait for compensation when medical bills and wage loss are accumulating exponentially. And why should the amount of recovery, if any, continue to depend so much on factors ranging from the personality of plaintiff's attorney to what the jurors had for breakfast that morning (now *that's* legal realism). It seems that these concerns might much better have been addressed than some of those fretted about in the *Study*, such as massaging in great detail marginal changes in the swamps of joint and several liability or product warnings.

That the *Study* gets itself mired in endless doctrinal detail is nowhere better illustrated than in the replies to the *Study's* views of such detail in this Symposium by Professors Phillips and Shapo.<sup>98</sup> Reading both of these pieces starkly illustrates the swamp one gets into when one immerses oneself in the technical minutiae of current product liability law. Professors Phillips and Shapo — like so many academic and practicing specialists in this area — obviously relish, with all their vast learning, navigating through this swamp of detail and minutiae.<sup>99</sup> But it was after all to help us get *out* of that swamp that the *Study* was commissioned. A few years ago a French author referred to “the delirium of [American] Due Process.”<sup>100</sup> But such vast complexities are true not only of constitutional law but tort and contract law and many other areas as well. Over twenty years ago John Frank called attention to the multiplication of burdensome and complex “decision points” throughout the American legal system.<sup>101</sup> No one can pretend that things have improved in this regard in the intervening years. Indeed, Professor Peter Schuck of the Yale Law School has recently refocused attention on the ever growing pathology of America's excessive legal complexity.<sup>102</sup>

But despite its often myopic focus on refining such matters of complex legal detail, the *Study* may unfortunately play a significant

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98. Jerry Phillips, *Comments on the Reporters' Study of Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 241 (1993); Marshall Shapo, *An ALI Report Markets a Defective Product: Errors at Retail and Wholesale*, 30 SAN DIEGO L. REV. 221 (1993).

99. Peter Schuck, *Legal Complexity: Some Causes, Consequences and Cures*, 42 DUKE L.J. 1, 7, 31-39 (1992).

100. MICHAEL CROZIER, *THE TROUBLE WITH AMERICA* (1985).

101. JOHN FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 85-110 (1969).

102. Schuck, *supra* note 99, *passim*.

role in shaping tort law in the near future. The *Study* was undertaken by some of the most respected scholars in the field, and accordingly will be very influential in the legal and academic communities. A most respected jurist, Judge Jack Weinstein of the United States District Court for the Eastern District of New York, has confirmed this sentiment, stating that the *Study* is "destined to be the baseline for judicial and legislative activity in the years to come."<sup>103</sup> Because of so much influence, the *Study* may have the effect of chilling the gathering of additional information on alternative systems — there may be a perception that too much will be needed to overcome the inert weight of a report as comprehensive as the *Study*. Further, even if valuable additional information is gathered, courts and legislatures may discount its validity for the very same reason. Thus, rather than setting the stage for epochal change as Beveridge or Woodhouse might have done, the *Study* may have the effect of freezing the bulk of the tort system into place for at least another generation, even though so much of that system has already long outlived its usefulness.

The authors spend a good portion of the *Study* ambitiously addressing the relatively recently perceived problems of toxic, environmental, and mass torts with adventuresome proposals, confirming that the authors were in search of somewhat bigger game than they bagged. But in all frankness, this approach essentially puts the cart before the horse. If, as the authors seem to concede, we cannot do all that much to solve tort law's approach to simple traumatic injuries such as those from malfunctioning products, we certainly cannot reasonably soon expect to tackle comprehensively the incalculably more complex and unknowable solutions and costs presented by toxic environmental and mass torts.<sup>104</sup>

### III. CONCLUSION

In the end, the comparison of the *Study* with those produced by Beveridge and Woodhouse is telling. Those two men sensed that the time was right for the sort of large-scale changes they proposed. Regardless of whether one agrees with their results,<sup>105</sup> each seized and built upon the opportunity presented to him, expanding upon the relatively narrow mandate he had received. Each took it upon himself

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103. *ALI Releases Study on Products, Mass Torts; Controversy Brews over Process, Substance*, Prod. Safety & Liab. Rep. (BNA) No. 19, at 477 (Apr. 26, 1991). "The report is 'a product of a team of 13 scholars who hold the full array of views that are taken seriously in the world of tort scholarship.'" *Id.* (quoting Paul C. Weiler, the *Study's* chief reporter).

104. For example, problems of causation and appropriate forums. *See supra* note 17 and accompanying text.

105. *See supra* note 84 and accompanying text.

to write the entire report, so as to minimize inconsistencies and maximize the force of his prose. Finally, each wrote quickly and concisely.

The *Study* is, unfortunately, a reverse image of the Beveridge and Woodhouse reports. At the time the *Study* was commissioned there was widespread, urgent public concern over the tort liability and insurance systems. The project set out to deal with this situation, not merely to bandage some areas where the bleeding was the worst. But in contrast to Beveridge and Woodhouse, the ALI authors end up confining themselves too much to poultices.

This course of action may have stemmed from the assembly of a large and diverse group of scholars, each of whom was to undertake a part of the task.<sup>106</sup> Because of this specialization, none of the authors seem to have thought in depth about *all* of the problem areas so as to be able to see the proverbial big picture for what it is. Instead, the *Study* concerns itself too much with details, and in the end makes proposals that at best will have their effect only at the level of detail. Also, the fact that the *Study* had numerous authors means that there is a greater sense of inconsistency, both at the macro and micro level, as well as a pervasive sense of compromise. This focus on detail meant also that the *Study* took a long time to complete — five years in all. The sense of crisis has significantly dissipated (not that the underlying problems have really changed, or that other crises do not loom ahead). The authors regard this as something positive, feeling that “we have had the luxury of forming our final judgments with a much better perspective on the overall problem.”<sup>107</sup> Perhaps, but they may also have lost a tremendous opportunity to ride a wave of public opinion strongly in their favor had they been able to see their way to do something more significant.

Indeed bold initiatives were and are all the more essential in light of what can be seen as further forthcoming problems for personal injury tort law. With the election of President Clinton, there seems a

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106. Another point worth noting is that those who were to investigate a certain area were by and large experts in that area before the *Study* began. Thus, each had his own biases going into the *Study*. In contrast, neither Beveridge nor Woodhouse was expert in any of the areas they set out to reform. The fact that Beveridge and Woodhouse were imaginative individuals bringing a fresh perspective to the problems they addressed no doubt was integral to their success. The ALI scholars, again in contrast, ended up shying away from making suggestions about anything but that with which they were most comfortable. The most vivid manifestation of this is their admission that they are a group of tort scholars who do not feel comfortable going beyond the bounds of tort. See *supra* text accompanying note 66.

107. 1 ALI STUDY, *supra* note 15, at 5-6.



consensus that some form of universal health insurance coverage will be urged. What will be its effect on personal injury tort law? Contrary to conventional wisdom, the expansion of social and private health and disability insurance, far from lessening reliance on tort suits as is commonly thought,<sup>108</sup> in fact encourages and indeed subsidizes them. Recent years, with all their explosive growth of social and private health coverage, have seen an even greater proportional expansion of tort liability. Why? Because tort victims, now cushioned by such new and expanded coverage and able to hire a lawyer on a contingent fee, are even more attractive targets for recruitment by plaintiffs' lawyers, whether by television ads or otherwise, capable as such victims now are of expanding their claims for pain and suffering (measured as a multiple of medical bills) and holding out for larger settlements. Admittedly, to the extent that health insurance reforms decrease coverage — by, for example, eliminating the tax exemption for health insurance programs beyond relatively bare-boned coverage — the encouragement and subsidization of tort suits might be lessened. But on balance it seems doubtful that any decrease in coverages will counterbalance increases. The irony then is that tort liability insurance — our worst form of insurance in fortuity and lassitude of payment as well as transaction costs — is our most expanding form of insurance, subsidized in effect by other, better coverages.<sup>109</sup>

This phenomenon makes it all the more essential that any resort to universal health coverage be accompanied by equally far-reaching restraints on what can be expected to be a corollary and indeed even greater expansion of tort liability insurance. A possible answer is the early offers approach mentioned above, whereby the providers of expanded health coverages, whether they be government or private, have the right to claim quick, early reimbursement of their expenditures from tortfeasors. The latter will face full-scale tort claims if they decline to (1) thus reimburse the health care payors and (2)

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108. Jeffrey O'Connell, *Must Health and Disability Insurance Subsidize Wasteful Injury Suits?*, 41 RUTGERS L. REV. 1055, 1057-61 (1989); Jeffrey O'Connell & Michael Horowitz, *The Lawyer Will See You Now: Health Reform's Tort Crisis*, WASH. POST, June 13, 1993, at C3.

109. O'Connell, *supra* note 108, at 1061-62. The figures appearing therein trace the relatively ever-increasing growth in tort liability bodily injury payments compared to payouts from other forms of public and private insurance for injury and illness from 1960 to 1982 to 1984. Shortly forthcoming will be a study by the senior author of this paper, Phillip Bock and Stuart Petoe, slightly revising while also extending these data, indicating a further greater comparative growth of tort liability payments compared to other insurance schemes as of 1988.

There are two factors leading to tort liability insurance's relative expansion compared to other coverages: not only is tort liability growing but other forms of coverage have been contracting (as public and private health insurance, for example, face cutbacks due to the economic pressures of recession and rising health care costs).

further compensate tort victims for economic losses in excess of all collateral sources.<sup>110</sup>

The penultimate irony of the whole affair is that, in the end, the *Study* was for all its caution too adventurous for the ALI, which has chosen to studiously ignore its contents.

As to the ultimate irony, the inadequacies of the *Study* culminated in the subsequent decision of the American Law Institute to follow up the *Study* with a revision of the *Restatement of Torts (Second)* as it applies to products liability. Product liability is such a mess (as was well documented by the *Study*) that the last thing it needs is to be restated. This is especially so in light of the fact that the *Restatement* of product liability law itself has been the source of so much confusion and waste. We have spent a generation litigating, for example, the difference between a defective and a negligently made product, and the difference between misuse and contributory (or comparative) negligence, only to find out in the end that in both cases there is not much difference.<sup>111</sup> For the *ALI Study* to have ended up with such a narrow view after its broad examination of tort law was bad enough; for the ALI itself to scurry back now to the even narrower view of a *Restatement* is indeed to compound the error.

None of the above should be taken to indicate a lack of respect and regard for the ALI's Reporter and his advisors. Indeed, it is that extremely high respect and regard that has led to our disappointment in the result of their extensive labors.<sup>112</sup>

The senior author of this article hastens also to acknowledge that he was an advisor to the project. So it may seem churlish of him to object to the *Study*. His only excuse — if one is necessary — is that

110. See *supra* notes 74-75 and accompanying text. See also O'Connell & Herowitz, *supra* note 108.

111. William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639; O'CONNELL, *supra* note 21, at 56-57.

112. Some remarks about Andrew Hacker would seem also to apply to Paul Weiler, the ALI's Reporter. In reviewing Hacker's book, *Two Nations*, Charles Murray writes:

His use of the statistical data is exemplary in two senses. First, . . . [his work] . . . is a textbook example of how to integrate data into a text. . . . [His] integrity with numbers is profound. It is one thing to avoid deliberately lying with statistics; almost anyone can do that if he wills it. The difficult thing about statistics is not moral but technical; it takes not only training but a feel for numbers and then tedious, hard work to put forward the data in a way that is both comprehensible and yet avoids passive deception.

Charles Murray, *The Reality of Black America*, THE TIMES LITERARY SUPPLEMENT, May 22, 1992, at 10.

the criticisms he makes now he made as an advisor. In that sense he bears some of the blame for what he perceives to be the *Study's* inadequacies. Obviously he wishes he could have been as persuasive to his colleagues on the inside as he hopes to be to readers on the outside.

A little over a decade ago, Professor Patrick Atiyah of Oxford University vigorously condemned tort law's transaction costs and payment for noneconomic loss. He hypothesized that with imaginative, sweeping reform society

could quite easily afford to compensate a significant portion of the pecuniary losses suffered by perhaps six, seven, or eight accident victims for every one protected by the tort system . . . . I will venture [he wrote] the prophecy that in fifty years time we look back with some horror on tort law as a means of compensation that survived too long.<sup>113</sup>

What is so lacking in the *Study* is just that sense of passion and urgency. For even if the recommendations settled for in the *Study* are adopted, society will face for far too long far too much of the tort system.

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113. Patrick Atiyah, *No-Fault Compensation: A Question That Will Not Go Away*, 54 TUL. L. REV. 271, 292-93 (1980).